

MORRISON & HECKER LLP.

ATTORNEYS AT LAW

1150 18th Street N.W., Suite 800
Washington, D.C. 20036-3816
Telephone (202) 785-9100
Telefax (202) 785-9163

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th St., S.W.
Room TW-B204F
Washington, D.C. 20554

Re: In the Matter of Amendment of the Commission's Rules Regarding Multiple Address
Systems – File No. WT Docket No. 97-81

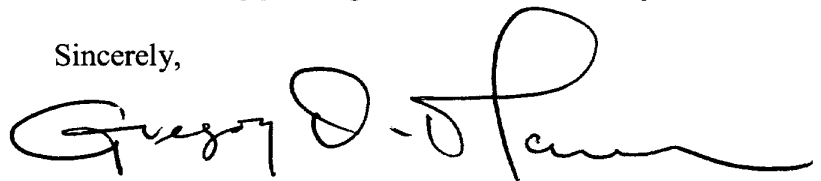
Dear Ms. Salas:

Enclosed please find the original and nine copies of the "Petition of Midwest Energy, Inc., in Support of CII Petitioners' Emergency Request for Limited Exception to Application Freeze" to be filed in the above case.

Kindly date-stamp the two additional copies provided and return to us at the above-indicated address.

Should you have any questions concerning this filing please give me a call. Thank you.

Sincerely,



Gregory O. Olaniran

Enclosure

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³ *Id.* at ¶ 15.

with limited bands being set aside for Federal government and public safety operations.⁴ The Commission also tentatively concluded that it had authority to resolve pending mutually exclusive MAS applications through competitive bidding.⁵ The Commission then suspended the acceptance and processing of MAS applications, except for applications for private use.⁶ Several parties filed comments in response to the NPRM.

On August 5, 1997, Congress enacted the Balanced Budget Act of 1997, P.L. No. 105-33 (the “Budget Act”). The Budget Act amended Section 309(j) of the Communications Act of 1934 (the “Act”) to require the Commission use competitive bidding procedures in resolving mutually exclusive applications for initial licenses, except in limited circumstances. The Budget Act also amended the Communications Act of 1934 to exempt certain licenses from competitive bidding, including those that pertain to “public safety radio services” (“PSRS”).

On July 1, 1999, the Commission released its Further Notice of Proposed Rulemaking and Order (the “FNPRM”) in this proceeding. In that release, the Commission seeks to address the impact of the Budget Act on the tentative conclusions the Commission reached in the NPRM regarding MAS applications by supplementing the record with respect to the earlier-issued NPRM.⁷ In particular, because the parties had split on whether competitive bidding should be used to resolve mutually exclusive applications, those positions had to be reconsidered in light of the Budget Act. Similarly, the Budget Act offers a more expansive definition of “public safety” that could broaden the scope of those exempted from competitive bidding.⁸ Pending the resolution of these issues, the Commission immediately suspended the acceptance or processing of applications in the 928/952/956 MHz MAS bands, apparently on the basis that, unless it did

⁴ *Id.* at ¶¶ 11 and 66.

⁵ *Id.* at ¶ 55.

⁶ *Id.* at ¶ 68.

⁷ FNPRM at ¶ 1.

⁸ *See generally*, FNPRM at ¶ 7.

so, additional portions of this spectrum might be improperly exempted from the competitive bidding process.⁹

In their Emergency Request, CII Petitioners ask the Commission to lift the freeze on the applicants intending to use spectrum for PSRS on the grounds that: (1) the freeze serves no valid purpose and (2) the freeze may adversely affect public safety. Midwest Energy supports their request to lift the 928/952/956 MHz MAS bands application freeze.

II. MIDWEST ENERGY'S USE OF THE 928/952/956 MHZ MAS BANDS FOR PSRS.

Midwest Energy is a corporation organized under the laws of the State of Kansas. Midwest Energy provides electric and natural gas service at both wholesale and retail, as well as retail propane service, in all or parts of forty-four counties of central and western Kansas. Midwest Energy currently holds site licenses for the 928/952/956 MHz MAS bands covering some, but not all, of its service areas.

Midwest Energy, like many of its CII counterparts, uses the 928/952/956 MHz MAS bands for the sole purpose of supervisory control and data acquisition and other private internal communication needs. For example, it utilizes these bands to maintain 24-hour, centralized, supervisory control and monitoring of its alarm system, line flows, and control devices. Midwest Energy desires to expand its use of these MAS bands to cover its internal communication needs for all, not just some, of its services areas. The freeze prevents Midwest Energy from taking the necessary steps to cover its public safety communications needs throughout its entire service area.

III. STATUTORY FRAME WORK

Section 309(j)(1) of the Communications Act of 1934, 47 U.S.C. § 309(j)(1), gives general authority to the Commission to conduct competitive bidding where the Commission has

⁹ *Id.* at ¶ 28.

accepted mutually exclusive applications for spectrum. Section 309 (j)(2) of the Act exempts, however, licensees providing “public safety radio services” from the competitive bidding process:

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission –

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organization, that

- (i) are used to protect the safety of life, health, or property ; and
- (ii) are not made commercially available to the public.¹⁰

The Conference Report, which accompanied this statute, identified types of licenses that would fall within the ambit of “public safety radio services”:

[T]he exemption from competitive bidding authority for “public safety radio services” includes “private internal radio services” used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments. Though private in nature, the services offered by these entities protect the safety of life, health, or property and are not made commercially available to the public. . . . The conferees note that the public safety radio services exemption described herein is much broader than the explicit definition for “public safety services” contained in section 3004 of this title (adding new section 337(f)(1) to the Communications Act).¹¹ (Emphasis added)

Midwest Energy is a utility that is engaged in the generation, transmission and distribution of electricity and the local distribution of natural gas. Midwest Energy uses this spectrum for its internal monitoring of its facilities in accordance with its public utility obligations. Accordingly, Midwest Energy’s service, as well as that of the CII Petitioners, falls within this statutory definition of PSRS.

¹⁰ 47 U.S.C. § 309(j)(2).

¹¹ H.R. Rep. No. 105-217 (July 30, 1997) (the “House Report”) at 1262.

IV. SUMMARY OF PETITION

Midwest Energy supports the CII Petitioners' request that the Commission lift the licensing freeze for utility, petroleum and railroad (PSRS) applications in the 928/952/956 MHz MAS bands. Lifting the freeze to this extent will not diminish the Commission's goal of assessing the impact of the Budget Act on the MAS procedures for subscriber-based services that are subject to competitive bidding, but would assist in safeguarding public safety and health.

The Commission should not have extended the application freeze to PSRS licensees because there is little or no uncertainty as to the type of licensing that is optimally employed for these public safety service applicants and because these applicants are not subject to the auction process favored by the Budget Act. In any event, the Commission failed to consider that a freeze on PSRS applications could adversely affect public safety. Mutual exclusivity, which is of considerable impact in processing the large number of subscriber-based MAS band services, has a negligible effect in the case of applications pertaining to public safety radio services. Accordingly, a freeze as applied to PSRS is disproportionately disruptive and unnecessary. The freeze also suggests the Commission has given too great a weight to competitive bidding, rather than to the statutorily-identified alternative means in § 309(j)(6)(E) of the Act, to resolve mutual exclusivity issues. Finally, the suspension places public safety and health - the very basis for which providers of public safety radio services are exempted from competitive bidding - in jeopardy. For these reasons, the Commission should lift the freeze on applications pertaining to PSRS.

V. PETITION

A. THE COMMISSION SHOULD NOT HAVE EXPANDED THE APPLICATION FREEZE TO APPLICANTS INTENDING TO USE SPECTRUM FOR PSRS.

The Commission improperly used uncertainty about what method of licensing to employ for subscriber-based MAS band services to justify a freeze on applications for PSRS use of the 928/952/956 MHz MAS bands. Unlike subscriber-based service applicants, PSRS applicants are not subject to the auction process, even in the event of mutually exclusive submissions. Thus, whatever decision the Commission makes regarding licensing of subscriber-based services will have no appreciable effect on licensing procedures for PSRS licenses. Consequently, the Commission could continue to receive and process PSRS use applications as well as continue to employ site-by-site licensing for such services without affecting its ultimate decision regarding subscriber-based services.

The only possible justification for freezing PSRS use applications would be to allow a greater portion of the 928/952/956 MHz MAS bands to be made available for subscriber-based services. Such a justification (aside from being self-fulfilling) would be shortsighted and contrary to prior Commission thinking. The Commission has allocated the entire 928/952/956 MHz MAS bands to private radio licenses. This has long been its dominant use, with approximately 70% of the applications coming from CII applicants.¹² The Commission's current thinking, however, seems to question whether it can continue not to use competitive bidding for any applications in these bands in light of the Budget Act.¹³

Even if a portion of the 928/952/956 MHz MAS bands is subject to competitive bidding, the proper response should not be to freeze all applications for its use, but to freeze only those that could be subject to competitive bidding, until proper procedures are implemented. This

¹² Emergency Request at 8.

¹³ See FNPRM at ¶¶ 15-16.

would mean a freeze on subscriber-based applications, not PSRS use applications. Also, this would serve the overall public interest (1) by allowing PSRS applicants to expand as they see fit to protect public safety and (2) by precluding subscriber-based applications from gaining unfair advantage in the 928/952/956 MHz MAS bands until the rules applicable to all subscriber-based services are in place.

Similarly, the draconian step of freezing all PSRS use applications pending the resolution of the extent to which the Budget Act expanded the definition of PSRS applicants is overkill. While the fear that non-PSRS applicants could take advantage of existing uncertainty to gain approval is, in our view, small, the Commission could deal with such problems on an ad hoc basis. Certainly, this fear does not warrant a freeze that extends to applicants who fit the traditional definition of public safety, who have existing PSRS, and who are only seeking to expand that existing service (or to replace existing service with technologically superior service) to other parts of their service territories.

B. THE RARE INSTANCES OF MUTUALLY EXCLUSIVE APPLICATIONS ALSO CANNOT JUSTIFY IMPOSITION OF THE FREEZE ON PSRS USE APPLICATIONS.

The Commission seeks comments on how to resolve mutually exclusive auction-exempt applications. However, as the Commission recognizes, there will be few incidents of mutually exclusively applications when the channel is exclusively reserved for public safety radio services because the applications are typically filed on a site-by-site basis and subject to prior coordination.¹⁴ Therefore, considering how rare these instances of mutually exclusive applications are, they cannot serve as a basis for imposing an application freeze on all PSRS applicants.

¹⁴ FNPRM at ¶ 24.

The Commission has a statutory obligation to find ways to avoid mutually exclusive applications. However, the freeze suggests that the Commission is looking solely to competitive bidding as the means to resolve mutually exclusive applications. Section 309(j)(6)(E) of the Act provides:

Nothing in this subsection, or in the case of competitive bidding, shall –

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;¹⁵

The Conference Report on this provision emphasizes the point:

[T]he conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.¹⁶

The legislative intent of Section 309(j)(6)(E), thus, is clear: the Commission is affirmatively obligated to employ alternative means to avoid mutually exclusive applications. The use of competitive bidding to resolve the relatively small number of mutually exclusive PSRS use applications appears to be counterproductive, and in any event, inapplicable to this category of applications. Rather, individual solutions, similar to what is now used, designed to maximize the overall public good would better fulfill the statutory directive.

C. THE COMMISSION'S ACTION CONTRAVENES LEGISLATIVE INTENT WHICH RECOGNIZES THE UNIQUE AND CRITICAL NATURE OF PUBLIC SAFETY RADIO SERVICES.

As stated, Section 309(j)(2) of the Act exempts PSRS applicants from competitive bidding process. In doing so, Congress recognized the unique and critical nature of the services

¹⁵ 47 U.S.C. § 309(j)(6)(E).

¹⁶ The House Report at 1262.

provided by this category of users of spectrum. The House Report stresses that “the services offered by these entities protect the safety of life, health, or property.” (Emphasis added). Clearly, Congress intended to protect PSRS spectrum users, so that they could continue to safeguard the safety, life, health and property. The application freeze, however, now places in jeopardy the expansion of these services which Congress saw fit to protect. Midwest Energy’s operations would be crippled without the ability to continue to expand its use of the spectrum for PSRS, because the alternatives are simply too inefficient. Further, inability to expand PSRS into rural or remote areas, where many of Midwest Energy’s facilities are located, may endanger lives. If for example, a line is knocked down, the inability to determine the line’s status could cause someone to take inappropriate action which could result in severe physical or fatal injury to employees or the general public and/or damage to property.

Moreover, there are no viable substitutes for the 928/952/956 MHz MAS bands. Land telephone lines and satellite technology, while available, are in general too costly. For instance, in the cases of rurally located facilities, although it is technically feasible to construct land lines, the astronomical cost of doing so makes it not a viable alternative. Therefore, the most efficient and reasonable alternative for Midwest Energy’s internal communications needs is the 928/952/956 MHz MAS bands.

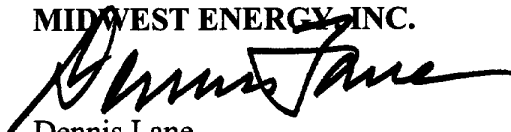
VI. CONCLUSION

It is more reasonable for the Commission to preserve, rather than to ignore, public safety while it attempts to resolve issues related to subscriber-based services arising from passage of the Budget Act. No objective sought to be accomplished by the Commission in the instant proceeding is hampered by a continued approval of applications for spectrum for use for public safety radio services. To the contrary, the existing freeze on such applications could be more harmful to public safety than can be offset by any supposed regulatory benefits.

WHEREFORE, Midwest Energy respectfully requests that the Commission grant the Emergency Request and promptly lift the freeze on filing of MAS applications by entities seeking to use the 928/952/956 MHz MAS bands for public safety radio services.

Respectfully submitted,

MIDWEST ENERGY INC.

A handwritten signature in black ink, appearing to read "Dennis Lane", written over the printed name.

Dennis Lane
Gregory O. Olaniran
Morrison & Hecker L.L.P.
1150 18th Street, N.W., #800
Washington, DC 20036
(202) 785-9100

August 24, 1999

Its Attorneys

::ODMA\PCDOCS\WDCDOCS\17862\2

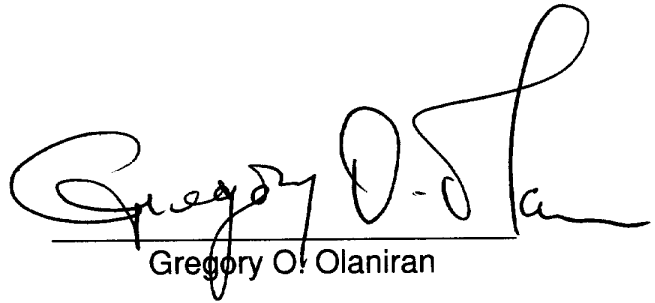
CERTIFICATE OF SERVICE

I CERTIFY THAT ON August 24, 1999, a copy of the foregoing "Petition of Midwest Energy, Inc., in Support of CII Petitioners' Emergency Request for Limited Exception to Application Freeze" was served by United States mail, postage prepaid to the following:

Jeffrey L. Sheldon
Thomas Goode
United Telecommunications Counsel
1140 Connecticut Ave., NW
Suite 114
Washington, D.C. 20036

Thomas J. Keller
Verner, Liipfert, Bernhard,
McPherson and Hand, Chtd.
901 15th Street N.W., Suite 700
Washington, D.C. 20005

Wayne V. Black
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001



Gregory O. Olaniran